80-1449

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NO.

in the

Supreme Court

of the

United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

SHEROLYN DENISE-HARRISON,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CASE NO: 79-13082

THE STATE OF FLORIDA,

Plaintiff,

vs.

SHEROLYN HARRISON,

Defendant.

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, by and through his undersigned attorney pursuant to RCrP 3.191 (h), the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution (1968) and respectfully moves this Honorable Court to suppress as evidence in this cause:

Any and all cocaine or any mixture containing cocaine as alleged in the information and which was seized from the Defendant's daughter.

GROUNDS FOR MOTION:

The evidence was illegally seized without a search warrant in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution (1978).

STATEMENT OF FACTS:

While at Miami International Airport on August 9, 1979, the Defendant was approached by Detective J. Wolfe of the Dade County Public Safety Department.

The Defendant was carrying her baby in her arms and appeared to be in the company of two other individuals.

The Defendant and the two others were approached by police officers.

A search of the Defendant's belongings revealed no contraband.

As the Defendant was walking down the concourse with Detective Wolfe, Detective Wolfe noticed a bulge in the baby's diaper.

Detective Wolfe had the Defendant put the baby down.

Detective Wolfe reached into the baby's pants and felt what she believed to be a soft bag.

Detective Wolfe had no permission from the Defendant to search the baby.

After feeling what Detective Wolfe believed to be a bag, the Defendant was placed under arrest.

Subsequent to the Defendant's arrest, a bag containing the evidence sought to be suppressed herein was removed from the baby's pants.

WHEREFORE, the Defendant respectfully requests this Honorable Court to grant this motion to suppress evidence.

Respectfully submitted,
BENNETT H. BRUMMER
Public Defender
11th Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida

BY: /s/ David Finger
DAVID FINGER
Assistant Public Defender

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

NO. 79-13080

THE STATE OF FLORIDA,

Plaintiff,

vs

SHEROLYN D. HARRISON,

Defendant.

Metropolitan Justice Building,
Miami, Florida,
Friday, 9:00 a.m.,
September 28, 1979.

The above-entitled case came on for motion to suppress before The Honorable Richard S. Fuller, Circuit Judge, pursuant to Notice.

APPEARANCES:

JANET RENO, State Attorney, by
RENA COHAN, Assistant State Attorney,
Attorney for Plaintiff.

BENNETT H. BRUMMER, Public Defender, by
DAVID FINGER, Assistant Public Defender,
Attorney for Defendant.

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MR. FINGER: There is a motion to dismiss as well as a motion to suppress. Which would the Court prefer go first?

THE COURT: That is what we are waiting for.

MS. COHAN: Prior to proceeding on anything, the State is now filing a new information out of an abundance of caution. That is all.

THE COURT: Without looking at it, I bet you can tell what it says.

MS. COHAN: I bet we added a count.

THE COURT: Added a count of possession.

MR. FINGER: That, obviously, is going to throw the trial posture in the case in a different position, but

the motion to suppress and the factual issues as to the motion to suppress, we can go on.

The motion to dismiss as to Florida Statute 893.135, would still lie as to Count I of the information regardless of what happens on Count II.

THE COURT: Your whole motions would still lie.

MR. FINGER: I understand exactly what she is doing. I will have to arraign my client on the new charges.

We will stand mute and invoke no discovery.

THE COURT: It will be entered by the Court as not guilty to the new information. Let us go with the motion to suppress. We have witnesses waiting and we can go on the legal matters after they have been excused.

MS. COHAN: I would inquire, prior to putting on any testimony, whether this is being video taped. I have undercover officers.

THE COURT: Would your feelings be offended if you knew they were here for some other case even though you have that beautiful red dress?

MS. COHAN: I understand who is currently in trial. The problem I have is I have an undercover officer.

THE COURT: There is another trial. I am sure they are not taping it. They may be monitoring it, but my word does not mean much. I am just telling you.

MS. COHAN: I will stipulate there is no search warrant in this case; however, I will not stipulate that the defendant has standing.

We are relying on Rocha v. Illinois and a long line of cases which are currently from the Supreme Court.

The evidence ceased in this case was ceased from an infant.

THE COURT: Please, Mr. Finger, no circus routine with the communications with the —

MR. FINGER: It is incongrous.

THE COURT: Sir, we will have no joking or funny communications with the interns and other office personnel.

MR. FINGER: I apologize. It was just a reaction. It is sort of incredulous.

THE COURT: Let us react appropriately to the evidence in the case and then we will take it up.

MR. FINGER: Has Your Honor found that we do have standing?

THE COURT: I am going to hear the evidence in the case and then everybody will have what they need in the record no matter what I do.

Call your first witness.

MS. COHAN: The State calls Detective Wolfe.

THE COURT: Would somebody be good enough to give me a copy of the motion to suppress.

Thereupon:

JODY WOLFE

was called as a witness on behalf of the State in the motion to suppress and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. COHAN:

Q State your name and occupation, please.

A My name is Jody Wolfe. I am a police officer with the Dade County Public Safety Department.

Q How long have you been so employed?

A Approximately six years.

Q Where are you currently assigned?

A I am assigned to the organized crime bureau, narcotics section.

Q On August 9, 1979, were you so assigned?

A I was assigned to the narcotics section, specifically, to the airport narcotics unit.

Q Have you received any specialized training in the field of narcotics?

A Yes. I have.

Q Will you tell us what that has been.

A Commencing with basic training in narcotics investigation at the police academy six years ago. [objection overruled]

A [Continuing] Since then I have attended a number of specialized seminars, some given by the Drug Enforcement Administration, the Narcotics Law Enforcement Narcotics Investigation, several given by the Organized Crime Institute Program at Barry College, dealing with, specifically, narcotics, conspiracy, cash flow investigation, focusing on narcotics investigation, advanced methods of narcotics investigation and so on.

In addition to that, we have have numerous seminars with the prosecutor's office in search and seizure and other techniques that we use at the airport.

Q On August 9, 1979, how long had you been specifically assigned to the airport unit?

A For over one year.

Q How long have you been a police officer?

A For nearly six years.

Q What did your duties at the airport unit include?

A The primary duty of the airport, or the primary objective of the unit, is the identification and interception of persons engaged in violating the narcotics law.

Q Pursuant to your duties, did you have occasion to watch passengers at the airport?

A That is correct.

Q How frequently?

A Several days of a given work week.

Q Approximately how many passengers do you watch in any given day?

A Of any given day, probably several hundred, maybe a few thousand, depending on the time of day.

Q Do you wear a uniform while you are working?

A No. I wear plainclothes.

Q Do you have occasion to watch any specific flights and, if so, why?

A We do watch flights to other major cities in the United States. We do tend to watch, particularly, non-stop flights outbound from Miami and the reason for this, being narcotic investigators, we are interested in the traffic flow of narcotics that leave Miami, source narcotics from Miami, to the other major cities or distribution points. Miami is a major source city. [objection overruled]

A [Continuing] Miami being a major source city for cocaine and marijuana throughout the United States at this time.

Q Based upon your training and experience, have you found anything peculiar to the airport as far as Miami being a source city for cocaine and marijuana?

MR. FINGER: Objection, again, as to relevancy.

THE COURT: Are you getting involved in the profile of this case? What is the relevancy?

MS. COHAN: In the experience at the airport with her arrests for narcotics violation.

THE COURT: What does that have to do with this particular one?

MS. COHAN: This particular one, I would proffer, was a bulge on a child consistent with narcotics and I need to know her experience in arrests relative to the bulge.
[objection overruled]

A In the period of time I have spent at the airport, I have had occasion to arrest a number of people using the airport, using air carriers to transport out of Miami to other major cities.

This has been accomplished, as we have seen, in three principal ways.

One of the ways and this is not in any particular priority, but one major way is in luggage which is taken on board the aircraft with the passenger.

Another major way is by use of a package or air freight speed pack; and and third way is by use of the body carry.

Q Were you working on August 9, 1979, at the airport?

A That is correct.

Q Who was your partner on that date?

A Detective Everett Titus.

THE COURT: Where is the defendant, please?

MR. FINGER: In the courtroom, Your Honor.

THE COURT: Go ahead. She was not with you. I wanted to be certain that there was not any issue raised later that she was not present at a substantial part of her trial.

MR. FINGER: On, no, Judge. She is here.

Q [By Ms. Cohan] At approximately 5:15 on August 9, 1979, did you have occasion to see someone who later became known to you as Sherolyn Harrison?

A Well, not just at 5:15, a little bit later than that, yes, I did.

Q Approximately what time did you first see Sherolyn Harrison?

A Probably closer to 5:20, about five minutes later than that. I didn't notice her right initially at the beginning of this investigation.

Q Did you see Miss Harrison in court today?

A I think I see her in back there. She is kind of blocked to my view.

Q Can you please attempt to point her out?

A I think she is in the second row from the back sitting to my right behind the man leaning over.

MS. COHAN: Indicating the defendant Sherolyn Harrison.

A [Continuing] Next to the lady with the baby.

MR. FINGER: Are we talking about to the right or left of the lady with the baby?

THE WITNESS: To the right.

MR. FINGER: As you are looking at it?

THE WITNESS: To my right, sir.

Q [By Ms. Cohan] Prior to observing Miss Harrison, did you observe anyone else at the airport that drew your attention?

A Yes. I did.

Q Were you able to subsequently identify these individuals?

A Yes. I was.

Q Can you identify them for us today?

A Neither of those individuals are in court, but one was a man by the name of Evans and the other was a woman by the name of Nancy Aphrodite Raymond.

Q What did you first observe?

A The first thing I observed was the man Evans barging in front of a line of people at National Airlines' ticket counter.

Q Approximately how many people were in line?

A Probably fifteen or twenty.

Q Will you describe the National Airlines' ticket setup for us, please?

A The area where Evans was barging into is an area of the ticket counter reserved for passengers waiting to purchase tickets for flights that date. It is not a regular check-in area if you already have your ticket. It consists of a roped area where passengers line up to wait their turn to approach the counter whenever a ticket agent becomes available to help them.

Q Did Mr. Evans get in line?

A No. He didn't.

Q Tell us what he did.

A He climbed over the ropes and walked directly to a ticket agent and there was some conversation which I was not able to overhear, but then he stood to one side and, eventually, spoke again with the ticket agent and essentially proceeded with his transaction at the counter.

Q After Mr. Evans had arrived at the counter for the second time, what occurred?

A A moment or so after that, a woman, the woman Nancy Raymond, approached him and I hadn't seen her

at first. I hadn't noticed her at first until she actually went over and spoke with Evans.

The only part of the conversation that I heard there was for a moment. He told her to wait in line and then a few minutes later, as he was completing his ticket transaction, he told her to go on toward the gate and he would catch up with her.

Q Did you see the ticket transaction take place at National Airlines?

A Yes. I did.

Q What did you observe?

A What I observed was Evans handing over a number of one hundred dollar bills. I could not hear the entire conversation, but he did request the flight leaving shortly for Los Angeles.

He received some change. There was one ticket handed to him and there was no luggage checked in.

Q Did Miss Raymond have any luggage which you observed?

A She had a tote bag, small carry-on — very small bag and I believe she had a purse.

Q Did Mr. Evans have any carry-on luggage?

A He also had a small bag, a small tote bag.

Q Approximately what time was the ticket transaction completed?

A About 5:20 or a moment or so after that.

Q Approximately what time was the flight to Los Angeles to depart?

A 5:30.

Q After Mr. Evans had obtained the ticket from National Airlines, what occurred?

A He left the ticket counter and he began walking very quickly, almost running. By this time I had watched in the direction that Nancy Raymond had walked and she had by this time met up with Sherolyn Harrison who was carrying a baby, a toddler, I should say.

He caught up with her some distance — he caught up with the two women some distance from the portion of the counter where he purchased the ticket. They turned and walked down the concourse together and went up the escalator together.

Q When you say "toddler," what do you mean?

A A child approximately a year and a half to two years old.

Q Was Miss Harrison in possession of any other belongings?

A I think she may have had a purse with her. I don't recall any other luggage.

Q Where did Miss Harrison meet up with Mr. Evans and Miss Raymond?

A Miss Harrison met up with Raymond, the girl, some distance from the National Airlines ticket counter closer toward the entrance to the concourse, maybe, a hundred feet away from where the ticket was purchased and then Evans joined the two women near that area.

They had begun walking from that area and were walking toward the concourse.

Q During the course of your observations, where was Detective Titus?

A He was in the vicinity. He was watching along with me.

Q After the three of them turned after the main lobby, what then occurred?

A They went up the escalator and we continued to follow and watch as he passed through the security checkpoint at the concourse. After they cleared the security checkpoint, Detective Titus went over and spoke with Mr. Evans and I waited for a moment or so to watch whatever reaction might occur or what might happen on the part of the two women.

I observed as they looked back at Evans who had stopped walking and had begun to speak with Detective Titus, they looked quickly at each other and they quickened their pace and continued walking down the concourse.

Q What did you do?

A After they had walked a distance of about ten feet, I went over to them, introduced myself, and asked if I could speak with them a few minutes.

Q How did you introduce yourself?

A I told them that my name was Detective Wolfe and that I worked for the police department and I would like to ask them a couple of questions, if they had no objection, before they caught the flight.

Q For what purpose did you identify yourself as being from the sheriff's department?
[objection overruled].

A Quite simply said that they should know exactly who I was and that I was — well, the main reason I introduced myself, if I am the least bit suspicious of a person in the airport, my experience has been that —
[objection overruled].

A [Continuing] It's been my experience that people who are sometimes carrying narcotics are afraid of a ripoff from some other source and would be more likely to be afraid of some stranger walking up to them and, maybe, react violently.

Q When you first approached Miss Harrison and Miss Raymond, did you have a firearm with you?

A Yes. I did.

Q Where was it?

A It was in a shoulder holster under a shirt under my jacket.

Q Did you have handcuffs with you?

A Yes. I did.

Q Where were they?

A Under my belt under my jacket.

Q Did you use anything to identify yourself?

A Just my badge.

Q How did you display that to Miss Raymond and Miss Harrison?

A I opened my badge case and showed it to them and, briefly, asked if I could speak with them just a moment.

Q Did you pull your weapon on them?

A No.

Q Did you touch either Miss Raymond or Miss Evans?

A Not at that point, no.

Q After you asked them if they would have any objections to speaking to you, what did they say?

A Miss Harrison, as I recall, did not say anything very much at that time, but Miss Raymond said sure, but she did not want to miss the flight. She did not mind answering a couple of questions.

Q What was your conversation at that point?

A I briefly asked if they had identification and if I could see it; if they would mind showing it to me. Sherolyn Harrison said she would not mind showing me any identification, but as it turned out, she did not have any. Nancy Raymond said she had some and began fumbling through her purse and opened up a purse and wallet and did not come across any right off the bat.

I asked Sherolyn what her name was — or I asked Miss Harrison what her name was and she said Harrison.

Q While you were talking to Miss Raymond and Miss Harrison, where were you located on the concourse?

A About twenty-five or thirty feet beyond the security checkpoint.

Q Were there other passengers in the area?

A Yes. There were people coming through the checkpoint and walking by.

Q Were there other police officers with you?

A Not right with me. I am quite sure there was an officer over at the checkpoint, but I am not positive.

Q How far away from the checkpoint were you?

A From the checkpoint or where the officer was?

Q The officer, I am sorry.

A Probably about forty feet.

Q Did he take any part in your conversations?

A Well, I am not even sure he was there. He certainly took no part in the conversation.

I am not sure — I am pretty sure there was one there, but I don't really remember.

Q Where were Mr. Evans and Detective Titus in relation to where you and the females were?

A They were standing between ten and fifteen feet closer toward the security checkpoint.

Q Whose back was to Mr. Evans and Detective Titus?

A The two women.

Q Did you notice anything about the behavior of Miss Harrison and Miss Raymonmd while you were talking to them?

A They were ill at ease. They kept turning over — Miss Raymond looked over her shoulder twice to look back at Evans to see what was going on and then kept fumbling through her wallet.

Harrison looked over two or three times to where Evans was standing and then looked back and they were both very ill at ease.

Q Did Miss Raymond show you identification?

A Before she showed me identification — no. She did not.

Before she showed me identification, I asked both women if I could have permission to look through their belongings.

Q To which belongings were you referring?

A I was referring to two purses, the two purses and a tote bag which they had with them.

Q What did either of them say?

A Miss Raymond replied that she had no objections and all of the items were put down on a little bench that was right there.

Sherolyn Harrison said she did not mind and Miss Raymond went to open one of the purses and as she was doing that, I stopped for a minute. I said, "I just want to be sure that you understand that you do not have to let me do this and this is up to you."

And she said sure, there was no problem with it and to go right ahead.

Q Did you do so?

A Yes. I did.

Q What, if anything, did you find?

A I found, of significance to me, a National Airlines ticket envelope with three one-way tickets, first class, from Los Angeles to Miami four days earlier in the names of Mr. and Mrs. Kahn and Mr. Jones. I found identification from Miss Raymond that said her correct name and, along with the tickets, were three used first class boarding passes in the same ticket envelope and there was a small cigarette case with one or two marijuana cigarettes.

Q What, if anything, occurred at that point?

A I searched through the other belongings and there was no contraband found and the women began walking down toward — we all began walking down toward the gate.

At this time Evans and Detective Titus had finished their conversation and they more or less joined this group of people who began to proceed down to the gate.

Q Did you learn, during the course of your conversation with Miss Raymond and Miss Harrison where either of them was from?

A Sherolyn Harrison told me she was from Miami and she was going to Los Angeles for a few days and Nancy Raymond —

[objection overruled].

Go ahead.

A Nancy Raymond told me she lived in Los Angeles and she was going home.

Q During the course of your conversations, did you learn about any additional luggage either of them might have?

A I asked if they had any checked luggage and they said no, they did not. The ticket was in —

MR. FINGER: I object, Your Honor, at this point as to who "she" is. Is she Nancy Raymond or my client?

THE COURT: Please identify.

A [Continuing] I asked both women if there was additional luggage and the response was not, there was no additional luggage from both women.

Q While you were conversing with Miss Harrison and Miss Raymond, where was the toddler?

A The entire time the child was in Sherolyn Harrison's arms. She was holding the child.

Q How was the child positioned?

A More or less straddling the front of her body. She would move the child from one hip to the other.

Q Where were the legs?

A Either dangling or around her waist.

Q How was the child dressed?

A She was dressed in a two-piece outfit consisting of slacks and a little smock top.

Q Was her entire body covered by that outfit during the time you were talking to Miss Harrison?

A Pretty much, yes.

Q Was it a female child?

A Yes, a little girl

Q When she started walking down the concourse with Miss Harrison and Evans, what occurred?

A I shared my observations with Detective Titus who shares his observations with me of what he had learned in his conversations and what I had learned in my conversations.

Q What, if anything, did you learn?
[objection overruled].

A I learned that Detective Titus had looked at the ticket in Evans' possession and discovered that it was in the name of Mr. and Mrs. Kahn and Mrs. Johnson and that Evans said that he didn't have any identification. I learned that Detective Titus had asked Evans what his name was and that Evans had told him that he was Mr. Kahn, but when he was unable to find any identification, he changed that story and told Detective Titus that his name was Oswald.

Detective Titus further told me that he had also received permission to check the bag that was in Evans' possession; checked it, found no contraband, but that it had the name Harrison on it and that neither the name Harrison or Oswald had anything to do with the names on the ticket that these three people were flying under and, obviously, I knew then, also, that the name Harrison and Raymond had no similarity to Kahn — Kahn and Johnson which were the names on the ticket, party of three, that these three people were going to use to fly.

Q What, if anything, did all of these things mean to you?
[objection overruled].

A The inconsistencies, the use — the inconsistencies and the story that was given by Evans coupled with the use of alias names for this trip to Los Angeles coupled with such a small amount of luggage for a party of three with a baby traveling across country one way, suggested to me the possibility that there was a violation of narcotics laws going on; that, perhaps, these people were smuggling narcotics.

Q At that point did you act on your suspicions?

A Not quite yet. We continued walking down the concourse. We had checked the belongings and there was no contraband.

Q At this time was Miss Harrison free to leave?

A Yes. She was.

Q As you were arriving at the gate, what occurred?

A Evans gave the ticket to Nancy Raymond who proceeded to turn it in at the gate for her boarding passes. When she handed the ticket to — as she was handing that ticket over, I had a chance to observe the names on the ticket and the spelling of this Mr. and Mrs. Kahn was completely different from the Mr. and Mrs. Kahn of the first ticket that I had seen, or the first two tickets I had seen, in her purse which was another inconsistency, a suggestion of another alias being used.

As we had walked down the concourse, I had become suspicious of a bulge which I observed in the front of the child's abdomen.

Q Would you describe the bulge, please.

A It was a thickness which I could see from the side of the child. Her dress had ridden up and the top portion of the little trousers which she was wearing was completely visible now as well as a portion of the abdomen over the top of the pants.

She looked as though she was wearing a diaper or Pamper underneath the little trousers, but it was twice or two and a half times as thick in the front around the tummy or abdomen, as it was across her back.

Q Have you had occasion to diaper an infant or toddler before?

A Yes, I have.

Q Was this bulge consistent with anything in your experience of diapering infants?

A No, not at all.

MR. FINGER: Objection. Personal experience is irrelevant in this particular cause, Your Honor. That bulge could have been caused by any a number of things beyond her expertise as a mother.

THE COURT: Overruled. We will certainly give you an opportunity to delve into that.

Q [By Ms. Cohan] When you noted the bulge, based upon your training and experience, what did you think it was?

A I suspected there was contraband in that bulge.

Q Why?

A Why?

Q Yes.

A I have had experience with the persons transporting narcotics in baby's diapers before.

Q On how many previous occasions, approximately?

A Personally, once before, but I am aware of several occasions where — I am aware of six other instances in the customs enclosure at Miami International Airport where this method has been used.

Q Have you had previous occasion to observe body carrys of narcotics?

A Yes. I have.

Q Approximately how many prior occasions?

A About forty or fifty — about forty.

Q Was the bulge which you observed in this case consistent with those bulges other than the fact that it was on an infant?

A I would say so.

Q What did you do when you noticed the bulge?

A Well, when this group arrived at the end of the concourse, I asked Harrison to put the child down on the floor and she did and I felt inside the front of the waistband of the child's trousers and I felt a plastic bag containing a granular substance that was consistent with cocaine.

Q What did you do at that point?

A I told her that she was under arrest and I verbally advised her of her Miranda rights.

A "Her" being Sherolyn Harrison?

A That is correct.

Q How did you advise Miss Harrison of her Miranda rights?

A At that time, verbally, from memory.

Q Did you at that point seize the cocaine?

A Well, I took the baby and carried the baby from that point on. I did not remove the cocaine. I checked where it was and it turned out there was a Pamper in between the bag of cocaine and the baby's skin and I decided to leave it until we got back to the station where I removed it.

Q For what reason did you check that baby initially? In other words, after you had noticed the bulge, why did you check the baby?

A I think once I become suspicious that that bulge was cocaine, I was primarily interested in the safety of the walfare of the child at that point.

Q Why is that?

A If the wubstance that I suspected was — that is, cocaine was actually in that child's pants near her skin or any mucous membranes or opening — [objection overruled].

Q [By Ms. Cohan] Go ahead.

A I suspect that contact of this kind of a substance in a small child, perhaps, in any fashion, could be quite dangerous for that child.

Q Were you afraid for the baby's safety?

A I was certainly very concerned about the baby's safety and welfare.

Q After you had reached into the baby's pants and felt the substance, how long after that did you take the baby into your custody?

A Immediately.

Q How did you do so?

A I picked her up.

Q Where were Miss Raymond and Mr. Evans?

A It was right about the time that I advised Harrison that she was under arrest Raymond returned with Detective Titus. He had been — I think they had gone to a private area for a pat down or search of Mr. Evans. I am not sure.

Miss Raymond was standing in the vicinity. She walked over and I advised her whe was also under arrest.

Q Had you at that point seen the cocaine?

A I had not.

Q Why not?

A I hadn't actually looked at it.

Q Why was that?

A I wanted to be able to remove it carefully and I didn't know exactly how it was placed; whether it was secured with tape or exactly how it was secured

inside the baby and I didn't want to take a chance of opening it quickly and having it spill all over and having it get on the baby or, you know, get anywhere.

Q Did there come a point in time when Miss Raymond and Mr. Evans were placed under arrest?

A Almost immediately, as soon as they were back together there.

Q For what were they arrested?

A Conspiracy.

Q Was anything seized from Mr. Evans?

MR. FINGER: Objection as to its relevancy.

THE COURT: What is the relevancy at this point?

MS. COHAN: Your Honor, I would proffer that the ticket in Miss Evans' possession, the boarding passes for the flight five days previously or four days previously was, in fact, seized from Miss Evans and the State will seek to introduce that as evidence.

THE WITNESS: From Miss Raymond.

MS. COHAN: I am sorry. Yes.

THE WITNESS: The three passenger receipts and boarding passes I found in Raymond's purse were seized.

Q Was anything seized from Mr. Evans? [objection overruled].

Q [By Ms. Cohn] Based upon your training and experience, with what was the substance you seized from the infant consistent with?

A The substance was consistent with cocaine.

Q Did you seize anything else from the infant?

A The outside, the bag securing it more or less to the baby, was a pair of pink plastic pants. We took those, also.

Q At what point was Miss Harrison no longer free to leave?

A At that point that I felt the substance in the baggie in the baby's pants.

Q Up until that point had you ever been discourteous to her?

A No, ma'am.

Q Had you ever attempted to conceal your identity?

A No.

Q Had you ever threatened her in any fashion?

A No. I had not.

Q Had you ever demanded she do anything up until the point you told her to put the baby down?

A No. I did not.

Q During the course of talking to Miss Harrison, did she answer all of your questions in a coherent fashion?

A There were a couple of questions she just didn't want to answer. She didn't answer them.

MR. FINGER: I object unless this prosecutor pins down what conversations we are talking about.

THE COURT: Sustained.

Q [By Ms. Cohan] During the course of your conversation with Miss Harrison, did she appear to understand what you were saying prior to being placed under arrest?

A Yes. She did and she was cooperative.

MS. COHAN: I would proffer there is no motion to suppress statements right now.

THE COURT: Unless there is something I have not seen—

MR. FINGER: No, Judge.

THE COURT: Anything else?

MS. COHAN: One other question.

Q [By Ms. Cohan] Other than yourself and Detective Titus, until the time that Miss Harrison was placed under arrest, were there any other officers involved in that?

A No. There were not.

MS. COHAN: Thank you.

THE COURT: Mr. Finger.

CROSS EXAMINATION

BY MR. FINGER:

Q Detective Wolfe, the reason you initially approached the two young women is because you were suspicious of the activity that you had witnessed earlier involving, specifically, Mr. Evans and Miss Raymond. Is that correct?

A I think that was part of it.

Q What is the other part?

A Well, some of it had to do with the fact that the three people, the three individuals, seemed to me to be trying to stay kind of far apart and not together at the ticket counter purchasing the tickets.

Q Detective Wolfe, up to the point where you walked up to the two young ladies and identified yourself, what specifically did the defendant Sherolyn Harrison do that aroused your suspicion? What did she do — not

what the other people did — but what was she doing that made you suspicious of her, specifically?

A I would say that what made me suspicious of her, not so much an active thing she did, perhaps more what she did not do.

Q What did she not do?

A That was — she was hanging very far away from the other two people for the period of time the ticket was being purchased as though to disassociate herself. I was surprised to see her together with the other two people.

Q In fact, right up until the time that Mr. Evans caught up with the two women, you believed that Sherolyn Harrison had nothing to do with Evans and Raymond?

A That is right. I didn't see her enter the scene until, really, quite at the end.

Q So your questioning or your introduction to Miss Harrison initially was based upon the suspicion which you had based upon the fact that she was being aloof or apart from the other two people and, subsequently, met up with and that is why you wanted to talk to Sherolyn Harrison.

Correct me if I am wrong.

A That was part of it, certainly.

Q What else had she done besides that?

A She had, herself, alone, apart from the other two, not done anything else.

Q For all you know, she could have been seeing those two people off at the gate, "See you around. Have a nice trip to L.A."

A Yes. That is possible.

Q Did the fact that she was carrying a baby arouse your suspicions?

A Not initially, no.

Q You are not suspicious of young ladies in an airport carrying babies, are you?

MS. COHAN: Objection. Argumentative.

A Of course not.

THE COURT: Overruled.

Q In fact, Detective Wolfe, you did not even notice Sherolyn Harrison until after the tickets had already been paid for by Mr. Evans.

A That is correct.

Q In fact, you did not notice Sherolyn Harrison until Nancy Raymond spoke to her very briefly and they started to walk off down the concourse.

A That is correct.

Q And as the three of them were walking down the concourse, Detective Titus approached the male, Mr. Evans. Right?

A Yes, sir.

Q And the two women continued to walk on as Titus stayed back to talk to the male. Right?

A Yes.

Q And that made you believe that the three of them were traveling together?

A No. What made me think the three of them were traveling together was I was expecting a party of three based upon the amount of money Evans paid for the ticket at the counter.

Q How much change did he get back? You did not mention that in the direct examination.

A It was a small amount of change. He paid in all one hundred dollar bills.

Q How many one hundred dollar bills?

A Four — I think four or five.

Q You did not notice how much change he got back?

A It was a small amount of change, a few dollars. I would expect it might have been — if I might look at my notes.

A Sure.

A It was six one hundred dollar bills and he got back — the total fare was about, in the vicinity of $565, $575, so he got back $30 or $40 back.

Q You specifically recall him receiving $30 or $40 back?

A Well, I knew then roughly what the fare was for three people traveling. I saw him hand over the six one hundred dollar bills.

Q Did you testify on direct that you did not have an opportunity to look at the ticket from where you were positioned; see the ticket, itself?

A That is correct.

Q So you could say at the time that you approached the group of three individuals how many people that ticket was for?

A The only reason I expected — you are correct. The only reason I expected three people was from the amount of money he paid for the ticket.

Q Could not have been four?

A I was expecting three.

Q Could it have been a ticket for four just as easily as for three?

A Not based on the number of bills he handed over. They were one hundred dollar bills.

Q So they are walking down the concourse and Detective Titus comes up and introduces himself, assumedly, to Mr. Evans, and then the two women walk on.

A They continued. They looked back and continued walking.

Q That is when you walked up and approached them. Right?

A Yes, sir.

Q And they were walking along; they were walking along down the concourse when you walked up and identified yourself?

A Yes.

Q And they stopped and talked to you?

A Yes. They did.

Q And you told them your name. Right?

A Yes.

Q And you told them you were from the sheriff's office. Right?

A Yes.

Q You told them you would like to ask them some questions. Right?

A Yes.

Q And at that point, I believe you testified on direct, Sherolyn Harrison did not say anything, did she?

A I don't remember her specific words. My impression, my memory, is that she nodded in the affirmative and Nancy Raymond did most of the talking.

Q You just forgot to mention that on direct examination about the nod in the affirmative?

MS. CCHAN: Objection.

THE COURT: Sustained. You can argue it to me.

Q [By Mr. Finger] You asked for identification from the two young ladies?

A Yes.

Q And you asked permission to search their belongings that they were carrying. Is that correct?

A Yes, sir.

Q At the time that you approached the two young ladies initially you had no idea, did you, whether or not any of these tickets that Mr. Evans had purchased were, in fact, for Sherolyn Harrison, did you?

A No idea, no idea, a suspicion that the three were traveling together and that he had the – it was the only assumption I could make at that point.

Q How about the fact that they were going to meet a third person at the gate and Sherolyn Harrison was there to see them off. Is that possible?

A Certainly.

MS. COHAN: Objection. Speculative.

THE COURT: Overruled.

Q [By Mr. Finger] That third ticket could have been for any third person. Is that right?

A It could have been.

Q I am talking about after the time you approached the two young ladies you did not know that Sherolyn Harrison was going to take one of those tickets and board the plane; she was just along with Nancy Raymond who you saw talking to Mr. Evans.

A My best observations indicated these three people were traveling together.

Q I appreciate your best observations. I am concerned with your knowledge of the tickets that you have seen Mr. Evans purchase in regards to whether or not they were going to be used by the defendant Sherolyn Harrison.

A That is correct.

Q You mentioned when you approached Miss Harrison and Miss Raymond they seemed ill at east.

A After a moment, yes.

Q How long have you been a police officer?

A Nearly six years.

Q You have had an opportunity to stop lots of people in the course of our employment?

A I have, certainly, stopped and spoken to lots of people, yes.

Q I am not just talking about narcotics; in your capacity as a police officer?

A Sure.

Q Is it unusual that a person is ill at east when they are approached by a police officer, identified as a police officer? Do you find that unusual?

A I don't find it unusual among certain people.

Q What kind of people?

A People who, perhaps, are anxious about something they may be doing wrong, in violation of the law. I think — I am not a very intimidating person. Most people are not nervous when I speak to them.

Q In your capacity as a police person, when you are talking to them in the capacity and you stop even an innocent person, they get nervous. Right?

A Not very often in my experience.

Q Ever make any traffic stops, pull people over on traffic stops?

A Yes.

Q And have it turn out you really had no basis for the stop or you let them go or things are not as you assumed?

MR. COHAN: Objection.

THE COURT: Overruled.

A I don't understand.

Q [By Mr. Finger] Did you ever pull over on a traffic stop and found you were mistaken, that the taillight was not out or they were not speeding? Have you ever made a mistake when you stopped and it turned out your suspicions were not right?

A Yes.

Q Were these people nervous when you spoke to them?

A Not consistently, no.

Q The ticket stubs that you mentioned, those were found in Nancy Raymond's bag. Correct?

A Yes.

Q And that little bit of marijuana was found in Miss Raymond's bag. Correct?

A Yes.

Q In fact, nothing of any note was found in anything that you could attribute to being in the actual or constructive possession of Sherolyn Harrison, my client?

A Nothing was found except the cocaine in the pants of the baby.

Q I am talking about the search. We are now at the point where you are searching the women's purses.

A Their purses, no. That is correct.

Q The women, themselves, the two young ladies, were wearing rather tight fitting clothes at that time, were they not?

A Close fitting, yes.

Q So, at least, in your own mind you were satisfied after you had made the search of the purses that these women were not carrying contraband on their body?

A Yes.

Q And it was while you were walking along after this search revealed nothing, that you noticed the bulge in the baby?

A When you say "the search revealed nothing," it revealed a few things to me.

Q Who did you arrest after the search of the purses?

A It didn't reveal anything I based an arrest on at that time, but it heightened my suspicions somewhat.

Q How did the fact that a small amount of marijuana in Nancy Raymond's purse heighten your suspicion?

A The marijuana didn't necessarily heighten my suspicions about anything. It is very inconsequential.

THE COURT: I did not hear the last half of the answer or the first part of the question.

MR. FINGER: I am sorry.

THE WITNESS: The marijuana, a couple of marijuana cigarettes, did not increase or decrease my suspicions. It was rather an inconsequential amount of contraband.

What caused me to be somewhat suspicious was the three receipts for a cross country flight, first class, from Los Angeles to Miami three or four days earlier for three people in names which had nothing to do with either of the two names of the two women.

Q Found in Nancy Raymond's purse?

A Found in Nancy Raymond's purse. This suggested to me aliases being used for travel and that I have found to be very consistent with narcotic traffickers.

Q So the fact that you found stubs in Nancy Raymond's purse which indicated there were aliases made you suspicious of Sherolyn Harrison?

A Yes, to an extent.

Q Why did you not arrest Nancy Raymond after you searched the purse?

A I would arrest her for what?

Q Possession of marijuana.

A In cases where there is a misdemeanor or less amount of marijuana, what I often will do is seize the contraband, take the information of subject and present the facts to the State Attorney.

Q And let the defendant get on a plane to fly to L.A. while you are doing it?

A Sure. I do not really have to arrest somebody for two marijuana cigarettes.

Q That is a crime in the State of Florida, is it not?

A I know, but I am not obligated to arrest somebody for two marijuana cigarettes. I am obligated to seize

the contraband and bring the facts of the case immediately to the prosecutor.

Q You felt obligated to arrest Sherolyn Harrison, did you not?

A I felt that that was — first of all, it was a felony as opposed to a misdemeanor.

Q You decided you would make that determination without talking to the State Attorney. Right?

A Well, yes, I did.

Q So you are walking down the concourse and Sherolyn Harrison is carrying the toddler in her arms and you noticed the bulge in the toddler —
[Discussion of other matters]

Q [By Mr. Finger] Have I got it back so far? When you were walking down the concourse is when you noticed the bulge in the toddler?

A Yes.

Q At that point you were still pretty much convinced in your own mind that there was narcotics somewhere? Would that be safe to say?

A Well, yes. I think that is safe to say. I was convinced that something was going on. My suspicions were more increased rather than decreased, especially as I conferred with Detective Titus.

Q You just felt that there was some contraband out there, but you just could not figure out where the stuff was?

A I sure couldn't, not immediately.

Q You say the bulge around the baby's stomach protruded about an inch to an inch and a half, approximately.

A It was more than that.

THE COURT: Could I see the deposition, Miss Bailey?

MR. FINGER: We are on Page 38 or 39.

THE COURT: Go ahead.

MR. FINGER: I will read them verbatim.

Q [By Mr. Finger] Do you recall giving a deposition at the Public Defender's Office on September 14 in my office?

A Yes.

Q You were sworn under oath to tell the truth?

A Yes.

Q I am on Page 38 and it would be, like, the second question from the bottom. Do you recall the question:

"Q You couldn't approximate how many it was protruded? Did it protrude a couple of inches?"

Then you indicated.

"Q Are you indicating an inch and a half?"

And your answer:

"A You mean the overall bulge?

"Q My question is: The whole thing an inch and a half to two inches? The front thickness was probably protruding an inch and a half to two inches?

"A Yes."

A Yes. I believe you just asked me if I said it was an inch to an inch and a half and I said it was a little more than that. I have a maximum here of two inches.

Q Okay. A maximum of two inches.

A That is probably about right.

THE COURT: Counsel, it is late in the day and Mrs. Rock would really like to keep you under 300 words a minute.

Q [By Mr. Finger] You would say a maximum of about two inches protrusion?

A Maximum, yes, sir.

Q And you could not really tell how long the bulge was, could you?

A No, sir.

Q You believed it was cocaine. Right?

A Not immediately.

Q When did you believe it was cocaine? After you reached in?

A When I felt it.

Q You suspected it was cocaine at that point?

A I suspected there was contraband there. I couldn't believe it was cocaine until I felt it.

Q What kind of contraband did you suspect it was?

A Narcotics.

Q What kind of narcotics?

A It could have been marijuana, heroin, cocaine, pills, a packet that would form that bulge of that sort and there are a number of different items that could form that kind of a bulge.

Q There certainly are, are there not?

A Yes.

Q You were afraid of that narcotic, whatever it was, coming into contact with the baby's skin, abdomen, whatever it was. Right?

A I was concerned for a child being in contact with any contraband of that sort in any fashion.

Q You have had occasion during the course of your employment to touch lots of different types of contraband, have you not? You pick it up, touch it, have it come in contact with your skin, have you not?

A No.

Q You have not picked up a lot of contraband?

A We try to avoid touching contraband with our bare hands as much as possible. It is a very bad idea to do it.

Q Have you ever felt cocaine?

A Through a bag.

Q You never touched it?

A Once — twice.

Q Not on this occasion?

A No. I did not

Q I mean, your actual hand?

A I try most of the time to avoid touching any contraband, any substance I do not know the physical composition of with my bare hands. There are a number of substances that could be very injurious to you and, as a police officer, I come in contact with lots of them and you try to avoid touching, especially narcotics, heroin and cocaine, with your bare hands.

When we take samples for field tests, we use a little paper snip or spoon or something like that. You don't touch it.

Q And you did not feel or touch the actual cocaine in this particular case, did you?

A Except through the plastic bag.

THE COURT: She said she has had no direct contact with any substance in this case. It was a plastic bag or a piece of plastic that separated the finger.

Q All you felt was a plastic bag with something swishy or soft in it. Would that be safe to say?

A A powdery substance with a few little crumbles in it which is consistent to substances I felt before which were subsequently found to be cocaine.

Q But no actual cocaine on the outside of the bag or gritty substance?

A There may have been minute amounts. I did not detect any, myself.

Q You are not a medical doctor, are you?

A No, sir.

Q What narcotics, particularly, that you deal with in the course of your employment are particularly hazardous to one's touch, if you know?

A Well, any substance that we come in contact with, if you do not know what the chemical composition of it is — the ultimate chemical composition of, you would take a precaution to avoid touching it.

Q In fact, you suspected this was cocaine. Is that not what you thought that the baby was carrying; that it was cocaine.

A Yes.

Q Do you know if cocaine causes any harm if you touch it? Does it cause sores, peeling of the skin, chaffing? Are you aware of that? Do you know?

MS. COHAN: Objection. It is beyond her knowledge.

THE COURT: Overruled. She can say that. Do not get lazy just because you are a lady. You want to be treated just like everybody else. Up on the feet.

A I am not specifically aware of cocaine being absorbed into normal, unbroken skin. I am specifically aware of the ability of cocaine to be absorbed through mucous membranes of the body and if it comes in

contact with various orifices, mouth, vagina, sinuses, it can be absorbed and small amounts would be fatal to a child.

I have had experience with people who have secreted cocaine in body orifices where the package has ruptured and the person was dead before they got to the hospital.

Q That was not at all the situation here. You had no reason to believe anything was secreted in any orifices of that baby, did you?

A I had no reason to believe it wasn't.

Q You had no reason to believe it was not secreted in a body orifice of Nancy Raymond, did you?

A That is true.

Q Did you do a body cavity search of Nancy Raymond to make sure it was not hidden there?

MS. COHAN: Objection.

THE COURT: Overruled.

A After she was arrested. She was searched.

Q How about prior to her arrest?

A No. She was not.

Q Do you know if a body cavity search was done on Mr. Evans to make sure he was not hiding anything in any orifice?

A I do not know.

Q Did you do a body cavity search of Sherolyn Harrison to make sure she was not hiding anything in any orifice?

A I did not do a body cavity search.

Q When you saw the bulge, you told Sherolyn Harrison to put the baby down. Is that not what you did?

A Yes.

Q And she complied?

A Yes. She did.

Q That is when you reached in and felt the soft bag?

A That is correct.

Q And you never ever got Sherolyn Harrison's consent to reach into the baby's pants to feel around in there, did you?

A At no time did I receive her consent.

Q Obviously, the baby never gave you any consent, did she, because she could not talk.

A No, sir.

Q MR. FINGER: That is all.

Q And from where you were looking at the side, it came up about two or three inches?

A [Indicating] Yes.

Q So we have it protruding a couple of inches and coming up about three inches?

A About.

Q At that point you were concerned with the physical well being of that baby. Is that not what you testified on direct?

A When I began to believe that there was contraband secreted on the baby, that is the point at which I began to be concerned about the welfare of the child.

Q Because you were afraid because of any mucous membranes that may be in contact with that suspected narcotics might cause some sort of medical ailment to the baby?

A I would be concerned any time a child might be placed near a substance such as cocaine, marijuana, heroin, pills, you name it.

Q Did you say something on direct examination about a baby's skin or mucous membranes coming in contact?

THE COURT: She said that.

A Any part of the baby.

Q In this case, it would be the baby's abdomen area. That is where you saw it. Right?

A That is where I saw most of the bulge.

THE COURT: Redirect. Do you have anything?

MS. COHAN: Just a couple of questions.

REDIRECT EXAMINATION

BY MS. COHAN:

Q Based upon your training and experience at the airport, do you know the price of a ticket to Los Angeles, approximately?

A Yes. Well, it varies. It is varying, but at that time it was approximately $150 to $125, something in that vicinity.

Q As a police officer, do you, in fact, have the discretion to arrest a misdemeanor?

A Yes. I do.

RECROSS EXAMINATION

BY MR. FINGER:

Q You decide when you are going to exercise that discretion and when you are not?

A No — I am sorry. What?

THE COURT: That is what discretion means.

MR. FINGER: That is what discretion means. I am concerned with the witness' understanding of what it means.

A Yes.

Q You exercise your discretion at whim. At your whim sometimes you will arrest for a misdemeanor and sometimes you will not?

A I like to think I use a little more than whim when I am doing something as serious as contemplating somebody's arrest.

Q You are a law enforcement officer sworn to uphold the law.

A Yes, sir.

Q There is a law in the State of Florida that says that possession of any amount of marijuana is, at least, a misdemeanor.

A That is correct.

Q And you decided, not withstanding your oath or duties as a law enforcement officer, you were not going to arrest Nancy Raymond for possession of that marijuana?

A The physical arrest of a misdemeanor amount of marijuana is discretionary.

MR. FINGER: Nothing further.

THE COURT: Do you have another witness?

MS. COHAN: No, Your Honor. The State rests.

THE COURT: Counsel.

MR. FINGER: The defense rests.

[Witness excused]

MR. FINGER: We have some argument, Your Honor.

Your Honor, I would move the Court to grant the defendant's motion to suppress the contraband seized in this particular case. I really believe that it is the analysis or the approach really calls for a two-step or, almost, a three-step analysis of what went on.

I submit to the Court there were really two stops and then a search. The initial confrontation when the police officer walked up to the two young ladies walking down, is, in fact, a stop or a seizure within the context of the fourth amendment and, as such, that must be based upon probable cause.

There are a number of cases, Your Honor, that hold that the type of factors which gave rise to this officer's suspicion is not sufficient even to make the approach. The prosecutor may contend that the initial confrontation is not a seizure. However, in Brown versus Texas, taken to the United States Supreme Court, cited at 99 Supreme Court 2637, the Court held that

whenever the police officers accosts an individual, refrains his freedom to walk away, she has seized that person. There are other cases.

There is the Elmo case which the State likes to cite frequently in which an individual was seated at a gate waiting for his plane to take off and the police went up to him, introduced themselves, much as the case is here. I think it is a Sixth Circuit—

MS. COHAN: Fifth.

MR. FINGER: A Fifth Circuit Court case and they walked up to him while he was seated waiting for a plane, introduced themselves. Subsequently, a search ensued and they found contraband.

That is distinguishable here, Your Honor, from this situation. The situation applies to the Brown case, the Supreme Court case, because Miss Harrison's freedom of movement was, in fact, restrained. That makes a seizure under Brown versus Texas.

They were walking down the concourse and they were approached by an officer and, when asked by the officer, they stopped and talked to her. What happened, in fact, is that they believe they have got to stop.

Cases such as United States versus Pope at 561 Federal 2nd 663 in 1977 stands for the proposition that the satisfaction of the drug courier profile, notwithstanding what the police officer may have said, that they did not use a profile, what she had was a suspicion which I really would contend to the Court is not well founded. It is suspicion by association.

I asked her specifically what Sherolyn Harrison had done which aroused her suspicion and the answer, Judge, was that she was with a couple of other people she was really suspcious about and, while we may have to agree that the suspicions were well founded as to Mr. Evans and Miss Raymond, what does that have to do with Sherolyn Harrison? All she did was wait off at a distance. Who knows whether she was waiting for them or not.

She was off in the distance holding the baby when she was approached by these two other individuals who the police were suspicious of. Sherolyn Harrison had not done anything up to the point she was met by these two other people. I do not think you can carry the suspicions as to two other people over to Sherolyn Harrison. She had done nothing.

They proceed down the concourse. They were — and I use this word — accosted by the detective who goes up and presents herself and asks to speak to them. In State versus Frost, a Third District Court of Appeals case — I do not have the official cite. It is in the Florida Law Weekly of August 24, 1979 — Judge Tanksley suppressed a seizure at the Miami Airport under very similar facts. The State took an appeal to the Third District Court of Appeals and the Court was affirmed in granting the suppression in Frost.

Your Honor, there was a consent subsequent to the stop which we do not even have here. The suspicion on the part of the police officer in Frost and the initial confrontation between the police officers and the subject in Frost was because Mr. Frost, in that case, appeared to be nervous and in a hurry and generally exhibited

characteristics the officer considered to be indicative of a possible drug courier.

I believe, also, in the Frost case, although I am not certain, that there was some discrepancy — yes, there was, Your Honor, a name discrepancy as to the driver's license Mr. Frost was carrying versus the ticket. So it is similar to what we had here as to the discrepancy of the names on the ticket and the nervous manner and walking hurriedly and, also, paying in cash. Everything the same. In that case the police confronted Mr. Frost and Mr. Frost subsequently gave his permission to search the suitcase from which the contraband was seized and the Court held that that initial confrontation when they came up to Mr. Frost and said, "We are police. We would like to talk to you," was, in fact, a stop and everything that flowed from that should be suppressed because the officers had neither probable cause to arrest Frost nor well-founded suspicions. In other words, those characteristics, nervous, walking hurriedly, inconsistent names, was not sufficient probable cause.

The Third District Court of Appeals applied an objective test in determining whether or not the police officers' confrontation is, in fact, a seizure because Elmo says under those certain circumstances it is not and what the Third District Court of Appeals says is that the crucial consideration is whether the person was under a reasonable impression that he was not free to leave the officers' presence.

We would only add that in determining whether such a reasonable impression existed, the test must be

what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes. The Court goes on to say that it was the opinion of the Court that when an officer makes a show of authority he accosts the subject and takes advantage of social pressures which inhibit the subject from declining to deal with them. They are saying that when a police officer approaches you and says, "I am a police officer. I would like to talk to you," it is not likely that that person will respond by saying, "No, sir. I do not want to talk to you. I will not talk to you. I am walking away."

The Court realizes that when someone is confronted by a police officer, he does not have in his mind, "I am free to leave. I am approached for a casual conversation and I am free to leave." It is not reasonable to think that a person would think that in that situation.

Your Honor, I submit it would be naive for the Court to find that because the officer comes in and says, "Hey, they are free to leave. She did not have to talk to me," that that is what the defendant thought. "Here is my badge. I am a police officer. I want to talk to you." The average person in the defendant's shoes or anybody sees it as a situation, "Here is the police. I have to deal with him. I have to talk to them."

Incidentally, Your Honor, in the Frost case subsequent to the stop, Mr. Frost gave consent to search his bag, "Go ahead and search it," and they found the contraband. They do not even have that in this case. They do not have anybody's permission to go into the baby's diaper. The baby couldn't give permission and the mother did not. That was very specific.

I would submit to the Court that the initial confrontation is, in fact, a seizure and is a restraint to the freedom of movement and a seizure under Brown versus Texas and that anything they seize subsequent to the initial seizure must be suppressed. Everything must follow if the initial stop is bad. That assumes, of course, for purposes of this argument, that the initial stop was bad, and I think under Frost and under Brown it was bad.

The possibility exists, Your Honor, that it could be a Terry type of stop, but, again, in United States versus Pope, the Sixth Circuit Court of Appeals, United States Court of Appeals, held that although meeting a drug courier profile does not establish probable cause, facts known to agents which corresponds to characteristics in the profile may be considered along with information obtained from other sources in determining whether the agents did have probable cause to believe that an offense was being or had been committed.

In other words, even to justify the Terry type of a stop and frisk situation, an investigator-stop, you need more than they were nervous; they paid in cash; and it was inconsistent names. That does not even allow them, under the rationale of the Court in Pope to make a Terry stop. You need more besides nervous, in a hurry and the defendant was with other people of whom they were suspicious. This is a case of suspicion by association. Sherolyn Harrison has not done anything.

THE COURT: Let me see Frost. Hand it up.
[Repititious Argument omitted].

MS. COHAN: Very briefly, initially, I would direct the Court's attention to Rocha v Illinois which holds, primarily, that a defendant's fourth amendment rights are personal rights which can only be exercised by the individual aggrieved by the search and seizure. Here the individual aggrieved by the search and seizure Here the individual from whom the contraband was seized was a child. That child is not seeking to assert her own fourth amendment rights; rather, Sherolyn Harrison is seeking to assert the fourth amendment rights of another individual.

THE COURT: I have a pretty hard time buying an argument that the defendant does not have standing for the purposes of this case, if that is what you are getting at.

MS. COHAN: It is, Your Honor. I would also allege, as far as the boarding passes which were seized from the possession of Miss Raymond, that clearly Harrison has no standing to assert any fourth amendment claim as to those. Those, in fact, were not from her child. They were not from anyone who has any type of legal relationship to Sherolyn Harrison.

They were, in fact, seized from the custody of Miss Raymond. I would argue that that is controlled by Rocha v. Illinois.

As far as the issue of how this particular criminal episode is viewed, the State would argue, first of all, that Brown versus Texas; Elmo, U.S. v. Pope, Battlement, have all turn on a factual determination by the Court. If, in fact, in Frost there was a ticket seizure by the two officers who did not return the ticket. It as the

same thing that the Elmo Court said developed into the exact point of the seizure.

THE COURT: Let me get this verdict and then you can argue without being rushed, if you do not mind.

[Thereupon, a recess was had after which the following proceedings were had:]

MS. COHAN: Your Honor, the State's position is, first of all, that the factual situation in Frost as well as Battlement and Hayes – Battlement and Hayes being a decision as to consent and the trial court believing the testimony of one of the co-defendants who testified – Battlement and Hayes and the factual situation in Frost, which is completely dissimilar to the factual situation at bar, our factual pattern indicates that, in fact, Sherolyn Harrison was free to go and did proceed to the ticket gate in the company of Miss Raymond and Mr. Evans and that Miss Raymond was given the ticket folder and was in the process of checking in at the gate, getting boarding passes, when the child was searched and the contraband seized.

Consequently, our factual pattern is completely different than Frost, or, indeed, any of the other cases. It is most similar, if at all, to U.S. v. Pope which held that a bulge in the profile is equal to an articulable suspicion. I would argue that in this case what we do have is an initial contact with the defendant Sherolyn Harrison. From that contact the defendant walked away. She walked to the gate and while she was walking to the gate, Detective Wolfe was conversing with Detective Titus, comparing notes, as it were.

During the course of their comparing notes, she learned of additional suspicious circumstances, that being, that Mr. Evans who had the ticket for the three of them was carrying a bag with the name Harrison on it and, also, at that point saw the bulge in the child.

It is the State's position that Detective Wolfe had no less than a duty to investigate what that bulge was, not only, because she believed it to contain contraband, but for the health, safety and welfare of the toddler that Sherolyn Harrison was carrying.

It is the State's position that that search of the toddler was entirely reasonable and that is mainly what the fourth amendment prohibits. The fourth amendment prohibits unreasonable search and seizures. In this case, given the totality of Detective Wolfe's knowledge of the facts and circumstances and the bulge appearing on the toddler, the State would argue that it is unreasonable to expect Detective Wolfe to stand by and take no action. It would have been the course which would have been most injurious to the child and, indeed, would have frustrated all law enforcement efforts to protect that child's safety.
[Repititious argument omitted]

THE COURT: I am aware of the neighborhood cases, of course, and aware of the fact that we are to look to the reasonable application of criminal law and you know, relatively strict compliance with the law with infringement rights given to us by constitution and that there has to be some pretty good, valid reason, factually and legally, before somebody's rights can be infringed upon.

Frost is interesting because — and I cannot say that I disagree with the Third District on that — Mr. Frost was standing there. He had no place to go. They had his ticket and they had everything else that was his and they were not about to give it back to him. I think that is what Judge Schwartz was so offended by and I think rightfully so.

The totality of these circumstances, the facts that led up to a grouping of three being together, the initial discussion, which I think was lawful by the police officers with the two people in one section, the two ladies and the child and the gentleman in the other, and then their going about their business and thereafter the police officer's action relating to the child, all authorize the police officers under these circumstances and keeping in mind the tender age of the child, the location of the package of the contraband, to seize that which was within and next to the abdomen of the youngster in this case and I find that there was probable cause for the purpose of the initial stop and inquiry.

I find that that had terminated and that the officer had probable cause to believe that the contents inside the clothing of the youngster was, in fact, contraband based upon her background insofar as the propensity of drugs in skin areas certainly would have led to some action in that regard.
[Thereupon other matters not relevant here were discussed and the proceeding concluded].

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1980

CASE NO. 79-2269

SHEROLYN DENISE HARRISON,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed October 14, 1980.

An Appeal from the Circuit Court for Dade County, Richard S. Fuller, Judge.

Bennett H. Brummer, Public Defender and Peter Raben, Assistant Public Defender, for appellant.

Jim Smith, Attorney General and Calvin L. Fox, Assistant Attorney General, for appellee.

Before HUBBART, C.J., and BARKDULL and BASKIN, JJ.

PER CURIAM.

The conviction under review will be reversed because the trial court erred in denying the motion to suppress

the contraband. See: Royer v. State, ___ So.2d ___ (Fla. 3d DCA 1980), opinion filed September 9, 1980; United States v. Mendenhall, _____ U.S. _____, 100 S.Ct. _____, 64 L.Ed. 497 (1980); Reid v. Georgia, _____ U.S. _____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1980); case No. 79-448, opinion filed June 30, 1980.

Reversed and remanded for further proceedings not inconsistent herewith.

HUBBART, Judge (concurring)

I concur in the court's reversal in this cause solely on the ground that there was no reasonable basis on this record for the police to have conducted a full blown search of the defendant — even assuming, as the state contends, that the police either effected no prior temporary stop of the defendant at the airport or did so based on founded suspicion. As such, the search here was unreasonable and its fruits should have been suppressed by the trial court upon the defendant's timely motion. *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Isham v. State*, 369 So.2d 103 (Fla. 4th DCA 1979), *cert. denied*, 381 So.2d 770 (Fla. 1980); *Schnick v. State*, 362 So.2d 423 (Fla. 4th DCA 1978); *Meeks v. State*, 356 So.2d 45 (Fla. 2d DCA), *cert. denied*, 364 So.2d 892 (Fla. 1978); *Carr v. State*, 353 So.2d 958 (Fla. 2d DCA 1978); *Harris v. State*, 352 So.2d 1269 (Fla. 2d DCA 1977); *Conner v. State*, 349 So.2d 709 (Fla. 1st DCA 1977).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA,

THIRD DISTRICT

CASE NO. 79-2269

SHEROLYN HARRISON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR HEARING EN BANC AND MOTION FOR REHEARING

COMES NOW, the Appellee, THE STATE OF FLORIDA, by and through its undersigned counsel submits this Motion for Rehearing, *En Banc*, and Motion for Rehearing, to wit:

I.

1. That in compliance with Rule 9.331 the Appellee hereby submits that rehearing *en banc* is necessary herein in order to maintain uniformity with this Court's previous decisions in *Jones v. State*, 360 So.2d 1293 (Fla. 3d DCA 1978); *Collier v. State*, 353 So.2d 1219 (Fla. 3d DCA 1977); *Jester v. State*, 339 So.2d 242 (Fla. 3d DCA 1976); *Rodriguez v. State*, 189 So.2d 656 (Fla. 3d DCA 1966); *Bush v. State*, 369 So.2d 674 (Fla. 3d DCA 1979) and *Myles v. State*, 374 So.2d 83 (Fla. 3d DCA 1979).

2. That the testimony this Court has overlooked the fact that the evidence presented by the state in the case at bar was undisputed. It was undisputed that the defendants were travelling under aliases. Mitchell holds that such a circumstance amounts to articulable suspicion. It was also *undisputed* that Detective Wolfe based upon her observations of forty previous "body carrys," including six (6) previous occasions that the body carry was on a child, that the bulge in the child's diaper was *extraordinary* and consistent with a body carry of narcotics. *Bush* held that an officer may rely upon his observations, training and experience to reach a determination of probable cause for arrest. Finally, contrary to *Collier* and *Jester*, this Court has overruled the trial court's findings upon *undisputed* questions of fact.

3. That the undersigned counsel expresses a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the foregoing decisions of this Court noted at paragraph 1 and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

II.

4. That this Court has overlooked the fact that the facts in the case at bar bear no relationship whatsoever to those in, *Royer v. State*, and *Royer* is on its face *confined* to its peculiar facts. *See, Slip opinion*, at pp. 2 (court opinion) and pp. 11-21 (Hubbart, J., *concurring*). This Court's opinion of 'reversed, *see Royer*', must necessarily be incorrect.

5. Further, this Court has overlooked the fact that *Royer* does not dispute any question of contact or consent in the airport context. *See*, Hubbart, J., *concurring*. Clearly, there may be consent after even a primary illegality and the Defendant was repeatedly warned of his right to refuse consent herein. *See, Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979). This Court has manifestly erred in failing to reach the decisive factor below, that the trial court affirmatively found that the transaction was *pursuant to the Defendant's voluntary consent. See, Husted v. State; Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 854 (1973). This Court should not reverse the trial court herein based upon *obiter dicta* in *Royer. See, Royer v. State*, at pp. 11-21 (Hubbart, J., *concurring*). The trial court's ruling upon an issue of consent should *not* be disturbed where in the case at bar, substantial competent evidence, *which the trial court chose to believe*, supports the trial court's view. *See e.g., United v. Fike*, 449 F.2d 191 (5th Cir. 1971), *cert. den.*, 404 U.S. 943, 92 S.Ct. 943, 30 L.Ed.2d 257 (1971); *State v. Nova; Husted v. State, State v. Battleman, supra.*

6. That in the holding of the *Royer* court, the court acknowledges that the opinion of the United States Supreme Court in *United States v. Mendenhall*, _ U.S. _, 100 S.Ct. 1870 (1980), is contrary to the facial holding of the *Royer* court. Slip opinion, at p. 8, line 5; p. 4, n. 6. Furthermore, the concurring opinions of two (2) members of this Court specially rejected the *obiter dicta* of the *Royer* court opinion and four (4) respected members of this Court did not participate in the *en banc* rehearing. Indeed, the State submits that *Royer* is erroneous in the face of *Mendenhall*, 100 S.Ct. at 1877-1879, and

Reid v. Georgia, _ U.S. _, 100 S.Ct. 2752 (1980). Contrary to the *Royer* court's view, *Reid* did *not* categorically reject all so called "profiel" transactions. *See also, Slip opinion* at pp. 11-21 (Hubbart, J., concurring). In *Reid v. Georgia*, the holding of the court is confied to the premise that *IF THE JUDGMENT OF THE COURT IS TO BE PREDICATED UPON TERRY A "STOP" UPON THE FACTS STATED BY THE GEORGIA APPELLATE COURT, THE "STOP" WAS NOT LAWFUL.* This proper analysis of *Reid* is found upon the *face* of the *Reid* opinion, thus:

> "[Holding]: The Appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profiel" a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically the court thought it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.
>
> "We conclude that the agent could not as a matter of law, have reasonably suspected the petitioner of criminal acitivity *on the basis of these observed circumstances.* Of the evidence

relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as the proceeded through the concourse relates to their particular conduct.

"FOR THESE REASONS, THE JUDGMENT OF THE APPELLATE COURT CANNOT BE SUSTAINED INSOFAR AS IT RESTS ON THE DETERMINATION THAT THE DEA AGENT LAWFULLY SEIZED THE PETITIONER WHEN HE APPROACHED HIM OUTSIDE THE AIRLINE TERMINAL. Accordingly, the judgment of the Georgia Court of Appeals is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion."

100 S.C.t at 2753-2754.

It is quite clear that *Reid* simply states that 'if this is considered to be a 'stop' it is not lawful.' THE UNITED STATES SUPREME COURT NEVER REACHED THE ISSUES OF *CONSENT* OR *CONTACT* upon the facts in *Reid.* See, 100 S.Ct. 2754-2755 (Powell, Burger and Blackmun, J.J. *concurring*).

7. A proper analysis of *Reid* thus centers upon the fact that the Court did not reverse the Georgia appellate court, but *REMANDED FOR FURTHER CONSIDERATION.* How this is essential to a *proper* evaluation of *Reid* centers upon the fact that the *Georgia appellate court* rested its holding upon two (2) distinct alternative grounds, numbered "1" and "2". *See, State v. Reid,* 149 Ga.App. 685, 255 S.E.2d 71 (1979), *cert. den.* June 20, 1979. The Georgia appellate court, *noting*

that South Florida is a notorious drug traffick terminal, first of all, held that the facts as developed from the drug courier profile *were articulable suspicion,* but relevant to the immediate discussion also held that:

> "2. In its ruling on the motion, the trial court found *"that at the time the officer suggested these men go back into the airport with him that by that time they were quote under arrest end quote."* The only evidence heard by the trial court was that given by the agent of the Drug Enforcement Administration who testified that the defendant and his companion consetned to return to the terminal *The Agent was not dressed in a uniform, although he did not produce his credentials.* He was wearing blue jeans and a light weight jacket. He had a gun in the rear area of his waistband, covered by his jacket, *and not visible to the defendant and his companion.* He was alone. There is no suggestion that the defendant was ruluctant to return to the terminal. *There is also no evidence of coercion, youth, lack of education, low intelligence, harsh questioning, or use of physical force.* State v. River, 142 Ga.App. 96, 235 S.E.2d 383 (1977). Whether consent was given to be determined from the totality of the circumstances. Schenkckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). At the conclusion of the state's evidence on the motion, both sides when questioned by the trial judge, indicated they had nothing further to present. The evidence of consent is unrebutted. Therefore, we hold that the trial

court erred in finding that the defendant was under arrest." (emphasis added).

255 S.E.2d at 72-73.

The United Staes Supreme Court left the foregoing alternative holding in the Georgia appellate court, intact even though the transaction may have begun with a "profile". The undersigned has conferred with the Attorney General's Office and the prosecutor in *Reid* and would indicate to this Honorable Court that the matter would be returning to the United States Supreme Court upon the contact/consent issue after remand and consideration by the Georgia appellate court.

8. Indeed, the Appellee submits that *Mendenhall* and *Reid* are entirely consistent with each other and contrary to the *Royer* court's opinion. *See, also, Slip opinion*, at pp. 11-22 (Hubbart, J. *concurring*). This Court's opinion has overlooked the fact that the *Royer panel* properly refused to substitute its judgment for that of the trial court where the evidence, *clearly supports a finding of free and voluntary consent. See, Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979); compare, *State v. Battleman*, 374 So.2d 636 (Fla. 3d DCA 1979). *With respect to search and seizure, there is no difference between Florida law and the Florida Constitution and the United States Constitution. See, Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979), *approved and adopted, Hetland v. State*, ___ So.2d ___ (Fla. 1980), S.Ct. Case No. 56,245, opinion filed September 11, 1980. This Court has overlooked the fact that the views of the *Mendenhall* court are therefore, *binding* upon this Court. Most respectfully, the state submits that under *Mendenhall*,

this Court should *not* substitute its judgment for that of the trial court.

9. This Court has overlooked the fact that these officers had a duty to act and were *undisputably acting in good faith.* The exclusion of the evidence herein as this Court has stated it in its opinion, would serve no purpose except to frustrate the interdiction of narcotics traffic. *See, United States v. Williams,* 622 F.2d 830 (5th Cir. 1980) *en banc, cf., also, slip opinion,* at pp. 14-21 (Hubbart, J. *concurring,* urging balancing of the *substantial* competing interests herein).

10. The issue herein as to the constitutional balance that should be struck in the airport context herein is of major and compelling statewide importance in Florida. The Florida Supreme Court has a related issue in an airport case pending before it in *Shapiro v. State,* Fla. S.Ct. Case No. 54,097. In view of the circumstances of this Court's opinion, and in view of *Mendenhall* and *Reid,* this Honorable Court should certify the precise questions of law and fact herein as ones of great public importance.

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will grant rehearing en banc and/or rehearing.

RESPECTFULLY SUBMITTED, on this 29th day of October, 1980, at Miami, Dade County, Florida.

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1980

FRIDAY , NOVEMBER 14, 1980

CASE NO. 79-2269

SHEROLY HARRISON,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Counsel for appellee having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: Calvin L. Fox
Peter Raben

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 79-2269

SHEROLYN HARRISON,
Appellant,

-vs-

THE STATE OF FLORIDA,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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